

**Kerrville Bus Co., Inc. and Amalgamated Transit Union, AFL-CIO-CLC, Petitioner. Case 23-RC-4941**

July 24, 1981

**DECISION AND DIRECTION**

The Board has considered challenges to ballots cast in a combined mail and manual ballot election<sup>1</sup> and the Hearing Officer's report recommending disposition of same. The Board has reviewed the Hearing Officer's report, the Employer's exceptions, and the entire record in this case, and hereby adopts the Hearing Officer's findings and recommendations<sup>2</sup> for reasons stated below.

The stipulation agreement executed by the parties on November 14, 1980,<sup>3</sup> provided in relevant part:

All regular and regular part-time operators in the unit will vote by mail ballot; the ballots to be mailed on December 1, 1980. All ballots must be returned to the National Labor Relations Board Resident Office, Region 23, located in San Antonio, Texas, by 4:30 p.m. on December 15, 1980.

The stipulation further provided that all other unit employees were to vote in manual elections held at three locations on December 17 and that all ballots were to be counted at 11 a.m. on December 19.

In the course of the election, the mail ballots cast by Robert Brady, Frank D. Roe, Wilfred Alfalla, James Pruitt, D. L. Hortman, Van T. Smith, and Robert W. Read, Jr., were challenged because they were received by the Resident Office in San Antonio, Texas, after the stipulated December 15 deadline for receipt of mail ballots. Evidence adduced before the Hearing Officer indicates that Brady's ballot was mailed on December 15 and received by

that office on December 19; Roe's ballot was mailed on December 14 and received on December 16; Alfalla's ballot was mailed on December 10 and received on December 16; Hortman's ballot was mailed on December 13 and received on December 17; Smith's ballot was mailed on December 10 and received on December 16; the ballots of Pruitt and Read had no mailing date and both were received on December 16. It is undisputed that all seven ballots were in the Board's possession prior to the time when all ballots, mail and manual, were opened and counted on December 19.

The Hearing Officer recommended that the challenges to all seven mail ballots in dispute here be overruled. In support of this recommendation, he found, *inter alia*, that the Postal Service's handling of these ballots was "poor at best," that the Christmas season obviously impeded mail delivery, and that the term "returned by" in the stipulation agreement was ambiguous and could have meant to some voters that a ballot mailed by December 15 would be timely. In sum, the Hearing Officer agreed with the Petitioner's argument that to refuse to count ballots actually received prior to the time for opening and counting all ballots "would give more weight to 'form' than to 'substance.'"

We note, preliminarily, our disagreement with the Hearing Officer's finding that the parties' stipulated return receipt date was ambiguous. The stipulated language quoted above clearly indicates that mail ballots had to be in the Resident Office by 4:30 p.m. on December 15. Although we have found, contrary to the Hearing Officer, that the stipulation agreement was unambiguous on this point, it does not necessarily follow that the Board is thereby bound to sustain challenges to the mail ballots received after December 15.<sup>4</sup>

We agree with the Hearing Officer that the challenges to the ballots of Alfalla, Pruitt, Hortman, Smith, and Read should be overruled. All of these ballots were mailed at least 3 days in advance of the return receipt deadline and from within the city of receipt (San Antonio) or another city less than 100 miles away (Austin).<sup>5</sup> Under the circumstances, we find that the aforementioned five employees mailed their ballots at a time when they could reasonably anticipate timely receipt by the Board through the normal course of the mails.<sup>6</sup>

In contrast to the foregoing, however, we cannot find that the ballots of Brady and Roe were mailed

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. On December 19, 1980, the ballots were commingled and counted. The tally was 78 for, and 83 against, the Petitioner; there were 27 challenged ballots, a sufficient number to affect the results of the election.

<sup>2</sup> In the absence of exceptions, we adopt, *pro forma*, the Hearing Officer's recommendation that: challenges to the ballots cast by Sam Hammack, Ray Archley, Susan Gulick, Reymundo Rodriguez, Raul Pena, and Garland Hillmer be sustained; challenges to the ballots cast by Stephen Capozza and Robert Dawsey, Jr., be overruled, but that their ballots be voided; and challenges to the ballots cast by Virgle Meredith, Patton Blessing, Gus L. Davis, Abel Arriaga, Tommy Harbin, Warren D. Ervin, and Tom Green be overruled and that their ballots be opened and counted.

In addition, we note that the Employer has excepted to the Hearing Officer's failure to sustain challenges to the ballots cast by Guadalupe Cerda, J. R. Kypuros, Homer Guitron, Jose Hernandez, and Jose Sepulveda on grounds that those mail ballots were untimely received. In the absence of any exceptions to the Hearing Officer's recommendation that challenges to those ballots be sustained on other grounds, we find it unnecessary to consider the Employer's exceptions in this regard.

<sup>3</sup> All dates are in 1980 unless otherwise stated.

<sup>4</sup> See, e.g., *Grant's Home Furnishings, Inc.*, 229 NLRB 1305 (1977).

<sup>5</sup> Based on proof of the Board's simultaneous receipt of all five ballots on December 16, we find that the ballots of Pruitt and Read, which bore no origin date stamps, were mailed no later than December 13, as were the other three ballots.

<sup>6</sup> See *Queen City Paving Company*, 243 NLRB 71 (1979).

at a time when they could reasonably anticipate timely receipt. Roe mailed his ballot on Sunday, December 14. Brady mailed his ballot on December 15, the date it was due. Even though Brady and Roe mailed their ballots in San Antonio, we find they could not have reasonably foreseen the receipt of those ballots at the Board's office in that city by December 15. Nevertheless, we agree with the Hearing Officer's recommendation that the challenges to these two ballots also should be overruled.

Whether a late ballot may be cast is a matter left to the reasonable discretion of the Board and its agent conducting the election.<sup>7</sup> In each case the Board has traditionally considered, *inter alia*, the following factors: (1) the reason the employee was late; (2) how late the employee was; (3) how long the voting period was; and (4) whether the ballot box was opened or the tally commenced at the arrival of the employee.<sup>8</sup> As a matter of fundamental statutory policy, it behooves the Board "to afford employees the broadest possible participation in the Board elections" as long as "the election procedures are not unduly interfered with or hampered."<sup>9</sup>

<sup>7</sup> See *Glauber Water Works*, 112 NLRB 1462 (1955).

<sup>8</sup> *Westchester Plastic of Ohio, Inc.*, 165 NLRB 219 (1967); *Groendyke Transport, Inc. and Ann Myers Bell d/b/a Bell Transport Company*, 204 NLRB 96 (1973); *New England Oyster House of Cocoa Beach, Inc.*, 225 NLRB 682 (1976); *Glauber Water Works*, *supra*. Although these factors have been applied in manual election cases, they are nonetheless equally applicable in mail ballot elections.

<sup>9</sup> *New England Oyster House*, *supra*.

Although the record here does not disclose any reason for Brady and Roe's late mailing of their ballots, the Board has not regarded the absence of an excuse as a factor invariably requiring that a late ballot not be counted. In the instant case, we find most significant the fact that the ballots of both Brady and Roe were received by the Board prior to the counting of ballots. We also note that the manual election did not occur until December 17, or at least 2 days after these two employees mailed in their ballots. Accordingly, we find that the lengthy mail and manual ballot election process was still in progress and that permitting Brady and Roe to exercise their franchise would not unduly interfere with that process.

#### DIRECTION

It is hereby directed that the Regional Director for Region 23 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Decision and Direction, open and count the ballots of Wilfred Alfalla, James Pruitt, D. L. Hortman, Van T. Smith, Robert W. Read, Jr., Frank D. Roe, Robert Brady, Virgle Meredith, Patton Blessing, Gus L. Davis, Abel Arriaga, Tommy Harbin, Warren D. Ervin, and Tom Green, and shall thereafter cause to be served on the parties a revised tally of ballots and, based on the count therein, issue an appropriate certification.